No. 82-1269

In The

Supreme Court of the United States

October Term, 1982

LLOYD L. FINK,

Appellant,

-vs-

BOARD OF EDUCATION
OF WARREN COUNTY SCHOOLS,

Appellee.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED FOR REVIEW

1. Are the school laws of Pennsylvania unconstitutionally applied to a teacher whose religious activity in the classroom is held to violate sections of the law which contain absolutely no prohibitions and simply authorize silent meditation and the study of the Bible as literature?

2. Does a public school teacher violate the "Establishment Clause" of the First Amendment by conducting religious activity in his classroom contrary to his supervisors orders?

3. Do the Constitutional guarantees of Freedom of Speech, Free Exercise of Religion and Academic Freedom allow a teacher to conduct religious exercises in his classroom?

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OPINIONS BELOW

The opinion of the Commonwealth Court which appears on the appendix at page 1a, is reported at 442 A.2d 837.

The Teacher Tenure Opinion of the

Secretary of Education of Pennsylvania, which appears in the appendix at page 18a, is reported at Department of Education Tenure Opinions, Vol.VIII, page 136.

GROUNDS OF JURISDICTION OF SUPREME COURT

This is an Administrative Agency Appeal from The Order of the Commonwealth Court, entered March 15, 1982 which affirmed the dismissal of Lloyd Fink as a professional employee of the Warren County School District. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on September 30, 1982.

A Notice of Appeal to this Court was filed in the Commonwealth and Supreme Courts of Pennsylvania on December 17, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(2)

CONSTITUTION PROVISIONS AND STATUTES

The following constitutional provisions are pertinent:

Fourteenth Amendment, United States Constitution. ...nor shall any State deprive any person of life, liberty, or property without due process of law:

First Amendment, United States Constitution;

Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof; or abridging the freedom of speech.

The following Statutes set forth in the Appendix are pertinent:

Section 1516.1 of the School Code, 24 P.S. sec. 15-1516.1

Section 1515 of the School Code, 24 P.S. sec. 15-1515

STATEMENT OF THE CASE

Lloyd L. Fink was a tenured professional employee of the Warren County, Pennsylvania School District from 1972 until 1978 at

which time his employment was terminated by the School Board because he was conducting religious activity in his classroom. For several years during his employment, Mr. Fink had read aloud from the Bible in the morning and afternoon sessions of his class and also recited the Lord's Prayer as part of the opening exercises in his elementary school classroom. In January, 1978 parents of two students in Fink's class met with the Acting Superintendent of Schools concerning the religious activity in Finks classroom. As a result of this meeting, the Acting Superintendent met with Mr. Fink on February 3, 1978 and informed him that, based upon his understanding of the laws of Pennsylvania and the decision of the U.S. Supreme Court in ABINGTON, Mr. Fink was prohibited from conducting any religious activity in his classroom, and that Fink's job could be placed in jeopardy if he continued this activity. As a result of this meeting, Fink ceased both

the reading from the Bible and the recitation of the Lord's Prayer, and, in an attempt to reach an acceptable accomodation, but without giving up his rights completely, he substituted other activity of a religious nature. Instead of the Lord's Prayer, Fink began saying an extemporaneous, spontaneous prayer with his eyes closed and head bowed which lasted approximately one half minute, without comment and without asking for student participation. And instead of reading the Bible in the morning, Fink read from a book entitled Bible Story Volume VII. Mr. Fink discontinued the afternoon religious activity completely.

By letter dated February 7, the acting Superintendent ordered Fink to cease and desist from all religious actions in his classroom. Lloyd Fink declared his intention to continue the activity claiming that his right to do so was guaranteed under the

United States Constitution.

After notice and hearing, Lloyd Fink's contract of employment with the School District was terminated, as of April 11, 1978. At the hearing, Fink testified that his activities had violated no law and that he was exercising rights guaranteed to him under the United States Constitution.

Under the provisions of the School Code, Fink appealed his dismissal to the Secretary of Education of Pennsylvania. On May 18, 1979 the Secretary dismissed his appeal and affirmed the dismissal. The Secretary held that Finks religious activity was a direct violation of two sections of the School Laws, Section 1515(a) and 1516.1 of the Code. The first section authorized a period of silent meditation in the school and the later authorized the study of the Bible as literature in secondary schools. The Secretary did not consider the application of Finks constitutional

rights, citing that as an administrative agency, the Department of Education was without power to consider them. In his opinion, the Secretary noted that Fink has raised Constitutional issues and they were preserved for appeal.

Mr. Fink appealed the Secretary's decision to the Commonwealth Court, raising the very issues sought to be reviewed here by brief and oral argument. Fink again claimed that his activities were protected by his Constitutional rights to Freedom of Speech, Free Exercise of Religion, and Academic Freedom. He further questioned the Constitutionality of the Statutes as applied to him, claiming they were facially overbroad and void for vagueness because they contained no prohibitory or restrictive language at all.

On March 15, 1982, the Commonwealth Court affirmed Lloyd Finks dismissal. The Court directly considered the issues raised by Mr.

Fink and held that his constitutional rights had not been violated.

The Court upheld the validity of the two sections of the School Law against their constitutional attack and held that Finks activity was a direct violation of the Establishment Clause.

On September 30, 1982, the Supreme Court of Pennsylvania, without comment, denied Finks Petition for Allowances of Appeal.

THE QUESTIONS ARE SUBSTANTIAL

Lloyd Fink's religious activity was not a violation of Sections 1515(a) and 1516.1 of the School Code. Those sections simply reflect an attempt by the legislature to enact legislation concerning prayer and Bible reading in the school that would be constitutionally permissible after ABINGTON SCHOOL DISTRICT V SCHEMPP 374 U.S. 203 (1963), which struck down the original section 1516 of the code. Lloyd Fink has never claimed to have

conducted any activity under either of these sections. Fink has acted only upon claim of Constitutional right. The lower Courts finding that Fink has violated these two sections is shockingly wrong and raises substantial Constitutional questions.

It is a basic principle of Due Process that an enactment is void for vagueness if its prohibitions are not clearly defined GRAYNED V CITY of ROCKFORD 408 U.S. 104 (1971)

These sections, which simply authorize and mandate certain activities in the classroom cannot reasonably be construed as a prohibition on all other religious activity. As applied, these sections are void for vagueness.

Additionally, by interpreting and applying these sections as a ban on any religious speech or observance in Mr. Finks classroom, the Commonwealth Court has rendered the statute unconstitutional under the First Amendment Freedom of Speech and Free Exercise

Mr. Fink tried to compromise and even changed his activities. The law as interpreted becomes unconstitutionally overbroad because of its application to expression sheltered by the First Amendment. SMITH V GOGUEN 415 U.S. 566 (1975).

The law, when applied as a legislative ban on religious activity in the school, exhibits hostility toward religion contrary to the "accomodating neutrality" required by the Constitution as expressed in numerous decisions of this Court. ZORACH V CLAUSON 343 U.S. 306 (1952); WALZ V TAX COMMISSION, 397 U.S. 664 (1970). And further, it is an impermissible interference with Fink's Free Exercise of Religion. The lower Court rejected Finks claim that this right was violated after making a religious belief/ religious action distinction and finding that religious actions could be prohibited. But that analysis is in conflict with the basic

principles previously announced by this Court in a series of cases since 1961 culminating in WISCONSIN V YODER 406 U.S. 205 (1972). Those cases have limited the governments ability to regulate religious actions and have balanced the burden on the activity against the state's interest in regulation requiring a showing of a compelling state interest to justify the regulation. The State could not show this compelling interest. While conceding the necessity of regulation to allow the orderly conduct of the schools, the state has no reason to place a total ban on religious activity in Fink's classroom.

The Commonwealth Court has held that because of Fink's government employment, his individual religious activity has violated the Establishment Clause of the First Amendment. That simple agency analysis expands the Establishment Clause beyond both its literal and interpreted scope and deprives public

employees of their Constitutional rights. It further ignores the prohibition contained in the Free Exercise Clause. An individual acting under claim of constitutional right cannot violate the Establishment Clause. The Lower Court has misinterpreted the decision of this Court in ABINGTON and has committed plain error.

It has been almost 20 years since the ABINGTON decision and yet the place of prayer in the public schools is one of the major topics in America today. The constitutional principle in ABINGTON has been widely interpreted. But that decision has now been expanded to deny individual liberties and to prohibit all religious activity in the school. That expansion effects millions of persons, teachers and students directly and all Americans indirectly.

Over the years, many federal courts have interpreted the Establishment Clause in light

of ABINGTON. And without exception, all have required some showing of collective government action involving religious activity, whether it be the action of the legislature or a political subdivision, before finding a violation of the Establishment Clause. Now, based on a misinterpretation of those federal cases, Pennsylvania joins Indiana (Lynch V Indiana University Board of Trustees 378 N.E. 2d 900 (1978) cert. denied 441 U.S. 946 (1979)), becoming the second state to drop the requirement of collective government action to find a violation of the Establishment Clause.

This extreme expansion of the Clause, and the courts holding that religious activity is banned in the school, raise issues involving the most fundamental of our constitutional rights that must be settled by this Court.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration

by the Court for their resolution.

Respectfully submitted,

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